St. Mary Medical Center *and* CNA/USWA Health-Care Workers Alliance. Case 31–CA–25739

June 27, 2003

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

On January 21, 2003, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and affirms the judge's rulings, findings,[1] and conclusions as modified and adopts the recommended Order as modified and set forth in full below.[2]

This case involves several allegations of 8(a)(1) and (3) violations by the Respondent during the Union's organizing campaign. For the reasons set forth in his decision, we agree with the judge's disposition of these allegations, except that we disagree with his finding that the Respondent, through Relief Supervisor Flora Lee, attempted to engage in surveillance of employees' activity at a union meeting in violation of 8(a)(1).[3]

1. Lee was invited, or at least thought she was invited, to attend the Union's meeting on the evening of May 9, 2002.[4] The Respondent's officials told her she could go because they believed she was not a supervisor, but they did not direct her to go. They did not ask her to report back after the meeting. As soon as Lee arrived at the meeting, she was informed that she could not attend. She then left. She did not say anything later to management about the meeting other than that she was not allowed to attend. Under these circumstances, the General Counsel has failed to prove a coercive attempt by the Respondent to engage in surveillance. Accordingly, we dismiss this complaint allegation.

2. We agree with the judge that the Respondent suspended and discharged Betty Melendez in violation of Section 8(a)(3) and (1). We note that the judge did not specifically cite *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), but that he nonetheless engaged in a *Wright Line* type of analysis. See, e.g., *T & H Investments*, 291 NLRB 409 (1988); *Bardaville Electric, Inc.*, 309 NLRB 337 (1992). Thus, the record shows that Melendez engaged in protected activity; that the Respondent had knowledge of that activity; and that the Respondent took adverse employment action against her (suspension and discharge). Animus can be inferred from the 8(a)(1) violations found by the judge, which we affirm. While we agree with the Respondent that it would not be unlawful for it to discharge an employee for using language that it found "offensive and in violation of the institution's core values of respect," we agree with the judge's finding that the Respondent's assertion that Melendez was discharged for making such remarks was pretextual, and that "the discharge was really for her union activity."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, St. Mary Medical Center, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of benefits and unspecified reprisals should they select the Union as their bargaining representative.

(b) Interrogating employees about their interest in and activity on behalf of the Union.

(c) Discharging employees because of their interest in and activity on behalf of the Union.

(d) Giving employees written warnings because of their interest in and activity on behalf of the Union.

(e) Promulgating and attempting to enforce an unlawful no-solicitation rule.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[1] Member Walsh agrees with his colleagues in affirming the judge's finding in sec. III,B,1,c of his attached decision that the Respondent violated Sec. 8(a)(1) by promulgating an overly-broad no-solicitation rule. Food Services Director Donald Pace told employee Carlos David that he did not "want to hear [David] or see [him] talking about the Union inside the hospital or the hospital ground [sic]." Subsequently, Pace issued David a written warning which stated that David could not "distribute or talk about union organizing activities during work hours." The judge found that the language in the written warning was overly broad under *Our Way, Inc.*, 268 NLRB 394 (1983), because it was not limited to the employees' "working time." Member Walsh notes, in addition, that Pace's oral admonition to David was overly broad because it was not even limited to *any* particular time, and instead on its face unlawfully prohibited solicitation at any time on the Respondent's grounds.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). Further, we shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc*., 337 NLRB 175 (2001).

[3] We find it unnecessary to pass on Lee's status as a supervisor within the meaning of Sec. 2(11) of the Act because we find the conduct attributed to her would not be unlawful even if she was a supervisor.

[4] Attendance by a supervisor at an organizational meeting of employees with their knowledge and consent does not constitute unlawful surveillance. *Dr. Philip Megdal, D.D.S., Inc*., 267 NLRB 82, 88 fn. 4 (1983).

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Betty Melendez and Paul Rodriguez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Melendez and Rodriguez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings, suspensions, and discharges of Melendez and Rodriguez and to the unlawful warnings given to David Carlos, and within 3 days thereafter notify these employees in writing that this has been done and that the disciplinary actions will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all former employees employed by the Respondent at any closed facility since May 6, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten employees with loss of benefits and unspecified reprisals should they select the Union as their bargaining representative.

WE WILL NOT interrogate employees about their interest in and activity on behalf of the Union.

WE WILL NOT discharge employees because of their interest in and activity on behalf of the Union.

WE WILL NOT give employees written warnings because of their interest in and activity on behalf of the Union.

WE WILL NOT promulgate and attempt to enforce an unlawful no-solicitation rule.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Betty Melendez and Paul Rodriguez reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions of employment and make them whole for any loss of wages or other benefits they may have suffered.

WE WILL rescind the written warnings given to Betty Melendez, Paul Rodriguez, and Carlos David and will not use such warnings in any way against them.

ST. MARY MEDICAL CENTER

Anne J. White and *Christy J. Kwon, Esqs.*, for the General Counsel.
David G. Freedman, Esq., of Los Angeles, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Los Angeles, California, on October 1 and 2, 2002, upon the General Counsel's complaint which alleged that the Respondent discharged two employees and gave written warnings to another all in violation of Section 8(a)(3) of the National Labor Relations Act (the Act). Various violations of Section 8(a)(1) are also alleged.

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that the two named individuals were discharged for cause.

Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following findings of fact, conclusions of law, and recommended Order.

I. JURISDICTION

The Respondent is a California corporation engaged in the business of operating an acute care hospital, in connection with which it annually receives goods or services valued in excess of $50,000 directly from points outside the State of California and annually derives gross revenues in excess of $250,000. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

CNA/USWA Healthcare Workers Alliance (the Union) is admitted to be, and I conclude is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

In early 2002,[1] the Union began an organizing campaign among the Respondent's approximately 1200 employees. Though sketchy in the record, it appears that a petition was filed for a unit of nurses and an election was held on May 2, with the Union receiving a majority of the votes cast. In March, the Union also began to organize the ancillary employees (principally those working in food service). This case involves certain acts of the Respondent toward food service employees, including the suspensions and discharges of Betty Melendez, and Paul Rodriguez, written warnings to Carlos David on May 24, and assorted acts alleged violative of Section 8(a)(1) in April and May.

During the time material, there were about 50 employees in the food service department, according to then Food Service Director Donald Pace. Nicolas Bada was the executive chef. There were 32 to 34 employees classified as food service workers, which included Melendez, Rodriguez, and David. Pace and Bada were admitted to be supervisors. At issue is whether Flora Lee was a supervisor or agent such that her activity would bind the Respondent.

B. Analysis and Concluding Findings

1. The 8(a)(1) allegations

a. By Nicholas Bada

Many of the complaint allegations appear redundant. Thus, it is alleged that Bada created the impression that employees' union activities were under surveillance [6(a)(i), (b)(iii), and (c)(i)], threatened employees with loss of benefits [6(a)(ii), (b)(ii), and (c)(ii)], promulgated an overly broad no solicitation rule [6(a)(iii) and (e)] and interrogated employees concerning their union activity [6(b)(i) and d(i)].

The General Counsel argues that during a one-on-one meeting between Bada and Melendez in Bada's office on May 6, Bada unlawfully interrogated her, impliedly threatened her, and created the impression that her union activity was under surveillance.

Melendez testified that when Bada called her into his office, he started by saying, "[I]t had come to his attention that I had been trying to help the union in the kitchen and he said people, several people had come and told him." She denied to Bada that this was true.

This opening statement by Bada is alleged to have created the impression that employees' union activity was under surveillance. I conclude not. In order to sustain an of creation of impression of surveillance, there must be some indication that the manager's statement that the employee was engaged in union activity could only have come from unlawful surveillance. Here such is not the case. As related by Melendez, Bada said it had come to his attention and several people had told him. Such does not in any way imply that Bada gained his information through surveillance. See, e.g., *South Shore Hospital*, 229 NLRB 363 (1977).

According to Melendez, Bada went on to tell her that she is "a very strong, powerful person," such that when she talks people listen. He suggested that she could sway employees for the Union, which she said she would not do. Then he asked if she had signed an authorization card. She told him she had, but that it did not mean anything. Bada told her he was worried about her, "I don't what (want) to see you get in any trouble." And toward the end of the meeting, he again asked if she supported the Union—that he thought she did.

Section 8(c) gives employers latitude in asking employees about their union activity and attempting to persuade them from supporting a union. Where coupled with threats or promises of benefits, such interrogation is unlawful. *Rossmore House Hotel*, 269 NLRB 1176 (1984). Here, I conclude that by telling Melendez he was worried about her, in the context of asking about her union acivity, Bada impliedly suggested that her support for the Union could have adverse consequences. Accordingly, the interrogation was violative of Section 8(a)(1), as was the implied threat.

[1] All dates are in 2002, unless otherwise indicated.

However, I do not find that Bada attempted to recruit Melendez to influence other employees by his statement to her that she is a strong and powerful person. He did not ask her to speak to other employees against the Union, which was the situation in cases cited by the General Counsel. In any event, since solicitation of Melendez was not alleged a violation of the Act, no finding need be made.

Rodriguez testified that twice a week after March, Bada would "pull me in his office" and tell that the Union was no good and he knew that Rodriguez supported the Union. Bada testified that Rodriguez came into his office about three times and told Bada he was opposed to the Union. There is a direct conflict between Rodriguez and Bada concerning who initiated these discussions, and what was said. I credit Rodriguez over Bada and find that their discussions about the Union was generally as testified to by Rodriguea.

It is specifically alleged that in a meeting Bada had with Rodriguez on May 7, Bada interrogated Rodriguez, impliedly threatened him, and created the impression that his union activity was under surveillance. According to Rodriguez, Bada started the meeting by saying that he and everyone, including the "sisters" "who own the hospital" were disappointed in him because they found out that he was prounion. "Because, and they saw me the night of May 2 celebrating with the nurses when they won their election to be represented by CNA." (Rodriguez is also included in a picture of the celebration in the Union's flyer.) Contrary to the General Counsel, I do not conclude this statement created the impression that the union activity of Rodriguez could only have been known through unlawful surveillance. His activity was, in fact, a matter of general knowledge and was published by the Union.

Bada also told Rodriguez that he had better not catch Rodriguez passing out union cards and he said, "[O]ne of these days you're gonna get in trouble and the sisters aren't gonna help you." As far as I can determine, there was no interrogation by Bada in this conversation; however, the statement that one day he would get into trouble does seem to be a threat of unspecified reprisals. Also Bada told Rodriguez that if the Union came in, employees would lose the benefit of free meals. I conclude that Bada threatened employees in violation of Section 8(a)(1).

The allegation in paragraph 6(d), interrogation by Bada, apparently is alleged to have occurred in a meeting with David at which Bada was present on May 10. This allegation will be considered below, since Bada was not the company spokesman at this meeting.

In paragraph 6(e), it is alleged that "[o]n various dates in April—May 2002, (Bada) promulgated and attempted to enforce an overly broad no solicitation/no distribution rule by telling employees that he did not want employees to talk about the Union during work time." I have found no testimony to this effect nor has counsel for the General Counsel directed me to any. Accordingly, I shall recommend that this paragraph be dismissed.

b. By Flora Lee

It is alleged, and denied, that Flora Lee was a supervisor within the meaning of Section 2(11) such that her actions would bind the Respondent. Primarily from the testimony of the Respondent's witnesses and its records, I conclude that during the times material here, Lee was a supervisor.

Pace testified that Lee was first designated as a "lead person" some time in 2001. "This year (2002) she also continued to fill in as a lead during some medical leave coverage for one of the regular food service supervisors (Evelia Arredondo, who was on leave following foot surgery)." Lee testified that Pace asked her to be the relief supervisor since Arredondo would be gone for 3 months. Pace gave Lee a badge to wear stating that she was a temporary (or relief) supervisor and he did so because, "while she was on that assignment (filling in for Arredondo), I wanted to make sure that the kitchen staff understood that she did have authority to direct them, and that when she was in the kitchen, that they needed to listen to what she had to say if there were work issues to be resolved."[2]

Pace further testified concerning Lee's duties

> Well, she would have to supervise the day to day kitchen operations, be a monitor that people were doing their jobs, make sure that, you know, the patients got taken care of, caterings were taken care of. If somebody called off sick, she would probably try to get some coverage for the schedule for that. So basically, she would try and coordinate the normal day to day kitchen staff.

On the work schedules in evidence, from February 17 through May 25, Lee is designated as "supervisor' typically 5 days a week. She also worked shifts usually two each week, for which she was not designated "supervisor."

There is little question that during the period from February through May, at least, the Respondent vested Lee with the authority to responsibly direct rank-and-file employees and so informed them. Such was her regular assignment during that period. Pace referred to Lee as a supervisor in his May 14 writeup of Rodriguez and as acting supervisor in his writeup of Melendez. Accordingly, I conclude that during the material times of the events here, Lee was a supervisor within the meaning of Section 2(11) of the Act during the time of the events here, even though her status as such was temporary. E.g., *E. I. du Pont Newport Local 9 (du Pont & Co.)*, 300 NLRB 1165 (1990).

On the evening of May 9, there was a meeting of employees at David's home. Lee is alleged to have engaged in surveillance of employees' union activity by attempting to attend it. Lee testified that David invited her to that meeting. Though he denied doing so, he testified that he did invite her to a meeting. In any event, she decided to attend and asked her superiors, Pace, Bada, and Robert Quarfoot, the Respondent's vice president of business development, if she should do so. According to Bada, "either Bob (Quarfoot) or Don (Pace) but they said, "Well, you are not a supervisor. You can go. If you are invited, you are free to go. You are not a supervisor at all."

Pace testified that before the meeting, Lee had come to him

> [A] little concerned and confused because she said, "I'm filling in as a supervisor." I said, "Flora, your official title is food

[2] Though of little consequence here, Lee testified that she had been given the badge about 6 months after being made the lead person, which would have been prior to her assuming Arredondo's duties.

> service worker. That is what this would be based on is the fact that, you know, that you are a line employee, and you would be eligible for the same type of Union, you know, contract as anybody else. So it's up to you to make that decision." I said, "You are only filling in as a temporary supervisor here. That's not a permanent job assignment for you."

After work that evening, she got a ride to the meeting with a coworker named Doyle. David testified that he received a call from the hospital that Lee was on her way to the meeting and he so informed the employees present and the union representatives. They said she could not attend because she was a supervisor. When Lee arrived, she was told she could not come in. Since she had come with others, David offered to give her a ride back to the hospital.

Lee testified that she was very upset and humiliated. She then paged Bada and told him what had happened. The next day Pace came to her and asked how the meeting went, and she told him that she had not been allowed to attend.

Although Lee may well have believed that she was invited to the meeting at David's home, there is also no question that she cleared her attendance with Quarfoot, Pace, and Bada, and she reported to Bada that evening. The next day Pace asked her about the meeting. On these facts, I conclude that in fact Lee attempted to engage in surveillance of employees' union activity with the blessing of her superiors. Knowing that she had been vested with supervisory authority, at least on a temporary basis, they should have told Lee she should not attempt to attend the meeting. According to Bada, they knew that she could not attend if she was supervisor, but they asserted she was not. Such assertions, contrary to the clear evidence of her supervisory authority, do no relieve the Respondent. The Respondent's actions, I conclude, violated Section 8(a)(1). This is the case, whether or not, as some testimony suggests, she attempted to see who was present by looking in the front window.

On May 9, and again on May 13, according to Rodriguez, Lee confronted him, said that she was disappointed in him for supporting the Union and referred to him as Judas. The General Counsel argues that such coerced and interfered with his Section 7 rights and was therefore violative of Section 8(a)(1). Counsel has cited no case wherein the Board has found that a supervisor violates the Act by calling an employee a name, even if degrading, absent a threat. Here there was no threat. I conclude that Section 8(c) prohibits finding a violation simply based on Lee calling Rodriguez a Judas. Of course, as in the cases cited, such could be evidence that his union activity was known to the Respondent for purposes of finding his discharge violative of Section 8(a)(3). But, I conclude, Lee's reference was not independently violative of Section 8(a)(1) and I shall recommend that paragraph 7(b) be dismissed.

c. By Donald Pace

On May 10 or 11, Pace is alleged to have unlawfully interrogated an employee about his and other employees' union activity. The General Counsel argues that this violation occurred during a discussion Pace had with David on the morning following the union meeting at David's house. Pace testified:

> What I did was I asked Carlos (David) to come into my office, and I expressed my opinion to him what I thought of somebody (presumably David) who would invite someone (presumably Lee) to their home and then relinquish control of his own home to a third-party (presumably the Union) and let them decide who was welcome in his home. And I told Carlos that if all of these activities and action start disrupting the workplace, that that I'm going to have an issue with: And I said, "That's why I'm talking to you now, because if this starts spilling over into the workplace were it creates grief and problems in the kitchen with the employees, then I have a problem with this." And that's when I explained to him, I said, "Carlos, I can't tell you how to run your own home, but I think it's totally the most inhospitable and rudest thing I've ever heard of to invite somebody to your home that gets to you front door and you tell them to go away. And it's not even you telling them, it's somebody else saying it for you."

David's version of his meeting with Pace is, in substance, the same. David testified, "that he has a problem that we didn't let Flora Lee to go inside the house." "He said tht he has a problem if it is involving his employee, Flora Lee, as a supervisor being treated different." "He told me that why did I let these people—that is way he called—he say, why did I let these people to control my house that night."

Nowhere in David's testimony, or that of Pace, is there an indication that Pace was questioning David about his union activity or the union activity of other employees. Though Pace's action in giving his opinion to David is questionable, and could be construed as threatening unspecified reprisals, it could also be construed as a statement of his legitimate concern that the union activity not disrupt the employees' work. In any event, only unlawful interrogation is alleged and I conclude he did not interrogate David. Accordingly, I shall recommend that paragraph 8(a) be dismissed.

Additionally, it is alleged that on various dates in April and May, Pace "promulgated and attempted to enforce an overly broad no solicitation/no distribution rule by telling employees he did not want to hear them talking about the Union at the hospital or on hospital grounds." This allegation is based on the testimony of David concerning the May 10 meeting with Pace and the written warnings he received on May 24.

David testified that at the end of the meeting with Pace, Pace "told me he doesn't want to hear me or see me talking about the Union inside the hospital or the hospital ground [sic]." This is undenied by Pace and generally corroborated by Pace's statement on the written warning he gave David on May 24: "Carlos has been told that he may not distribute or talk about union organizing activities during work hours. This is a violation of hospital policy." And, "Carlos must immediately cease any union activities during work hours or face possible progressive discipline."

The test of whether a no-solicitation rule is valid (there being no issue here concerning distribution of union literature) hinges on whether the prohibition applies only to time the employees are working at their jobs. If so, then the rule is presumptively valid. However, if the prohibition includes all working hours, then the rule is presumptively invalid since on its face such

would apply when employees are on break and before and after work. The Board has therefore held that a rule prohibiting solicitation during "working time" is presumptively valid and one prohibiting solicitation during "working hours" is presumptively invalid. *Our Way, Inc*., 268 NLRB 394 (1983), in which the Board noted that by the time of its decision the "distinction between 'working time' and working hours' had attained substantial understanding, and many unions and employers had fashioned their instructions, policies, and rules in reliance on the principles" set forth in earlier cases.

Though the distinction between "working time" and "working hours" may seem trivial, if not meaningless, it is a part of labor-management lexicon which employers are deemed to know. Indeed, the Respondent's written policy banning solicitation during "work time" is presumptively valid. However, Pace amended this policy when he told David that he could not talk about the Union during "work hours." In doing so, he promulgated a presumptively invalid no-solicitation rule. And he enforced this unlawful rule by issuing David a written warning on May 24. The Respondent offered no evidence why this presumptively invalid rule was permissible. Accordingly I conclude that the Respondent violated the Act as alleged in paragraph 8(b).

2. The 8(a)(3) allegations

a. The suspension and discharge of Betty Melendez

The facts surrounding the suspension and discharge of Melendez are not in dispute. Sometime in late April or early May, Melendez talked twice to Pace about a raise and receiving no satisfaction, approached an individual named Jeff (Jernigan) from human resources. She testified that she "went to his office and we discussed what was going on in the kitchen. And he asked me to explain to him what, what, you know, I was there to talk to him about and I told him I, you know, I didn't think it was fair. I said I work very hard, I says I have a lot of experience, a lot of knowledge, I can do every job in the place." Jeff said that he would look into the matter and a week or so later, on May 9, Jeff told her that he agreed she deserved a raise and that if Pace did not give her one, he would. "He says don't worry, he says don't get upset."

But she continued to be upset and cried while working by herself in the kitchen. Lee came into the kitchen and asked Melendez what was wrong. Lee said to her, "[M]aybe I can help you. And I, I said to her, I said it just gets me mad that I can do every job in here, I can be pulled from one job to another job and help everybody do their work, and all of these dumb yellow bus people are going to be getting raises and I'm not." Lee told her not to worry and left.

According to Lee, Melendez was "upset because of the raise" and said to Lee "I'm going to make the same amount of money like this stupid yellow bus in the kitchen." Lee asked whom she was referring to and Melendez said, "Oh, that stupid Carol and Jennifer." Lee testified that Jennifer is very slow and Carol is hyper.

Lee testified that she reported this incident Bada, writing: "She told me about the pay that she is making the same amount as the yellow buses in the kitchen make." Bada in turn reported to Pace who suspended Melendez for 3 days with the explanation: "On 5/9/02 Betty was talking to Acting Supervisor Flora Lee and made some very disparaging and discriminatory Remarks about co-workers. She specifically referred to several other employees as 'Stupid Yellow Bus' people. And how could they be making the same amount as her. This represents a serious violation of behavior and attitude Inconsistent with the values of the hospital."

Melendez responded in writing that she was sad and had been crying and said to Lee, "I just don't understand, how I don't get a raise but all the Dumb Yellow Bus people got one." She ended her response: "I'm very sorry and this will not happen again."

On May 14, Pace discharged Melendez, he claims, "for making disparaging and discriminatory remarks against another employee." The issue is whether the suspension and discharge of Melendez was the result of her perceived activity on behalf of the Union, or, as asserted by Pace, because she had made an offensive and disparaging remark about coworkers. I conclude that the discharge was really for her union activity.

First, I simply do not believe Pace. He asserts that what Melendez said to her supervisor, no one else being present, was of the same seriousness as a racial or ethnic slur is simply incredible. Indeed, there is minimal indication what the reference to "yellow bus" is suppose to mean. It is certainly not commonly known as a slur. Melendez testified that she had heard the phrase used commonly by others, including supervisors. Lee testified that she had heard it once, at a distance. Pace testified that he had never heard it before. Quarfoot testified that he had never heard this phrase, but nevertheless thought is so egregious as to warrant discharge.

Pace testified that he might have considered a lesser penalty "[b]ut her approach was so offhanded that it was like this was acceptable, and to me, that wasn't acceptable, and it showed no remorse for even making the comment whatsoever." Yet he testified that he had not read the written response submitted by Melendez which contained the apology. Either Pace was not telling the truth (which I believe to have been the case) or he did not consider all available evidence before deciding to discharge Melendez, which itself suggests a hidden motive.

But even if Melendez meant to disparage two employees who were slow in their work, to discharge her for saying so only to her supervisor, in the context of believing she would not get a raise while the others would, goes well beyond reason. In fact, others who used racial slurs were disciplined with only written warnings. Of course, an employer does not have to be guided by reason or consistency in terminating employees; however, experience dictates that where an employer's decision is patently unreasonable or inconsistent, then the employer's self-serving explanation need not be accepted by the trier of fact. Indeed, in such a situation, I can, and do, infer a motive which I believe the Respondent sought to hide—that the union activity of employees was the basis of the suspension and discharge of Melendez. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). I therefore conclude that the Respondent suspended and discharged Melendez in violation of Section 8(a)(3).

b. The suspension and discharge of Paul Rodriguez

On May 14, Rodriguez was suspended by Pace

> Paul approached me on 05/02/02 with a complaint about his supervisor Flora Lee. He felt she was rude and treated him with disrespect when she asked him why he didn't make custards for the patients. He felt she should have discussed it only in private and not where others could overhear. He freely admitted that he did not make the custards and also told me "he wasn't going to take any more of her S—." I investigated the incident and felt that while the counseling location was not entirely appropriate, Flora was performing her duty consistent with the guidelines. (cont. separate page) Paul was counseled about his attitude and behavior towards staff and patients previously as documented on Oct 22, 2001. (See Attached). Also he was counseled about inappropriate behavior on March 6, 2001 as documented. (See Attached). This demonstrates a negative behavior pattern that seems to crop up with some regularity. It is unacceptable to have this type of issue continue to be a problem.

Rodriguez was thus suspended for 3 days, and when he reported back to work on May 17 (or May 20), was discharged. In asserting a pattern of unacceptable behavior on the part of Rodriguez, Pace relied on two earlier incidents—one on March 6, 2001, involving an argument between Rodriguez and another employee wherein both were "raising their voices in public." The second occurred on October 22, 2001, and involved an argument between Rodriguez and Lee in the presence of a patient, and Rodriguez was suspended for 3 days for: "1. Rude comments about Patient. 2. overstepping bounds—calling security. 3. inappropriate behavior towards co-workers." Though Rodriguez tends to minimize the seriousness of these previous events, no doubt they did occur.

The question then is whether the claim of relying on two events occurring 7 to 14 months previously, was a pretext or was true. I conclude that Pace's asserted reliance on the two previous events was a pretext to disguise his true motive in suspending and discharging Rodriguez. These two previous events hardly establish a "pattern of inappropriate behavior towards co-workers and patients" as argued by the Respondent.

There is little doubt about Pace's animosity toward the Union and the employees' organizational campaign. That Rodriguez was a supporter of this campaign was a matter of common knowledge. His picture with some nurses the night of their election victory appeared in the Union's flyer. In his dispute with Lee, for which he was discharged, Rodriguez did exactly what he had been told to do previously—that is, take up with a superior any dispute he had with another employee, or in this case, a lower-level supervisor. Finally, Pace's action against Rodriguez did not take place at about the time it occurred (May 2) but nearly 2 weeks later and after the union flyer was published and Rodriguez became generally known as a sympathizer. Counsel for the Respondent incorrectly stated in his brief that this event occurred on May 12, which, if true, would have minimized the significance of the delay.

The dispute between Rodriguez and Lee, for which the Respondent claims he was discharged, involved Lee's contention that Rodriguez had not made enough custard on May 1. Rodriguez contends that he did, but in any event, he reported Lee's criticism to Pace. I conclude that absent the union activity, Pace would not have discharged Rodriguez for doing so. I conclude that in suspending and discharging Rodriguez, the Respondent violated Section 8(a)(3) of the Act.

c. The written warnings to Carlos David

On May 24, Pace gave David a written warning dated May 23 which states:

> On Wednesday May 22, 2002 Carlos was observed in the company of Albert and Art (Surgery Supply employees) by Jim (Security Officer) near the corner of Physical Therapy and Food Service Offices and was talking to these other employees about a "Union Newsletter' he had in his hand. Jim stated to me (Don Pace) that he asked if they were on a break and that Carlos immediately put the newsletter in his pocket and returned to work. Carlos has been told that he may not distribute or talk about union organizing activities during work hours. This is a violation of hospital policy.
>
> Carlos must immediately cease any union activities during work hours or face possible progressive discipline.

On May 24 David received a second written warning, signed by Pace that day, which reads:

> On Friday May 17, 2002, Carlos was observed outside the hospital warehouse area at approximately 4:30 pm. Carlos had worked in the kitchen earlier that day, but was off work at approximately 1:30 pm. Carlos knows that he is not supposed to be in an unauthorized work area or hanging around the hospital grounds during off hours.

The warning for talking about the union during "work hours" was clearly unlawful and violative of Section 8(3). David and the other two employees were on break and certainly had the Section 7 right to talk about the Union. Similarly, the warning for being on company property after work hours was an unlawful interference with Section 7 rights. As Pace admitted, the Respondent had no policy requiring employees to stay off the property after they had finished working. Pace claims that his policy "is to go home when you when your are off the clock." "That's my policy regardless of whether there is a stated specific hospital one." There is no evidence of a business justification for the alleged policy asserted by Pace.

Pace clearly had animus against the employees' union activity, and toward David specifically, as demonstrated by his statements to David following the May 9 union meeting at David's house. These warnings, I conclude, were in retaliation for David's union activity and would not have been given absent that activity. David had been given only one warning (for being late) in his 14 years of employment. Accordingly, I conclude that the Respondent violated Section 8(a)(3) by issuing David two written warnings on May 24.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I conclude that it should be ordered to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act, including offering

reinstatement to Betty Melendez and Paul Rodriguez to their former jobs, or if those jobs no longer exist, to substantially equivalent positions of employment and make them whole for any loss of earnings and other benefits in accordance with the provisions *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for* the *Retarded,* 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]